TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 55

AMERICAN AIRLINES, INC., PETITIONER,

vs.

NORTH AMERICAN AIRLINES, INC., AND CIVIL AERONAUTICS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 17, 1956

CERTIORARI GRANTED JANUARY 28, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 55

AMERICAN AIRLINES, INC., PETITIONER,

vs.

NORTH AMERICAN AIRLINES, INC., AND CIVIL AERONAUTICS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Proceedings in the U.S.C.A. for the District of Columbia Circuit		
Joint appendix containing the hearing before the Civil Aeronautics Board	A	a
Order of CAB, dated January 28, 1953	3	1
Excerpts from stipulation of facts	171	4
Excerpts from stipulation of documentary material	172	5
Initial decision of Walter W. Bryan, Examiner, and service thereof	183	6
Opinion of the CAB, decided November 4, 1953	199	22
Appendix—Excerpts from the initial decision of Walter W. Bryan, Examiner, etc.	218	40
Order of the CAB, dated November 4, 1953	229	51
Regulation, Serial Number ER-178, adopted August 19, 1952 and introductory note to said regulation	295	52
Opinion, per curiam	481	56
Order pursuant to remand by the Supreme Court	483	57
Order denying petition for rehearing	532	58
Clerk's certificate (omitted in printing)	535	58
Order allowing certiorari	536	59

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 6, 1957

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,041

NORTH AMERICAN AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

AMERICAN AIRLINES, INC., Intervenor.

ON PETITION TO REVIEW ORDER OF THE CIVIL AERONAUTICS BOARD

JOINT APPENDIX—Filed April 24, 1954

[fol. 3] Serial Number E-7107

BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its Office in Washington, D. C. on the 28th day of January, 1953

Docket No. 5774

In the Matter of the Application of NORTH AMERICAN AIRLINES, INC., for Authority to Conduct its Operations Under the Name of North American Airlines, Inc.

Docket No. 5928

In the Matter of an Investigation Pursuant to Section 411 of the Act of Certain Practices of NORTH AMERICAN AIRLINES, INC.

ORDER

Twentieth Century Airlines, Inc. (Twentieth Century), a North Carolina corporation, was issued a Letter of Regis-
[fol. 4] tration as a Large Irregular Carrier on July 22, 1947. Section 291.28 of the Board's Economic Regulations, adopted August 19, 1952, requires that, on and after November 15, 1952, any air carrier holding a Letter of Registration as a Large Irregular Carrier shall do business in the name in which its Letter of Registration is then issued and outstanding. However, such carrier may do business under such other or different name as the Board may by order permit, upon a finding that the use of such other name is not contrary to the public interest. The introductory comment to this regulation states that the November 15, 1952, cut-off date has been fixed so as to enable any carrier which has developed good will in a name different from that in which its Letter of Registration is held, to apply for and obtain permission to use such other name. Also it is pointed out that where good will has been established in a name by use thereof, the Board will deny permission to continue such name only in cases where it believes that a violation of Section 411 may be involved and

such fact has been established after notice and opportunity for a hearing.

According to information furnished by the applicant, the corporate name of Twentieth Century was changed to North American Airlines, Inc. (North American), on March 3, 1952, by amendment to its certificate of incorporation. On March 11, 1952, North American, by letter, requested the Board to reissue the Letter of Registration heretofore in the name of Twentieth Century to North American. On October 6, 1952, North American applied for Board authorization herein to use said corporate name in its business after November 15, 1952, in lieu of the name "Twentieth Century". In support of its application, North American alleges that: it has invested substantial sums of money and good will in the name "North American" at a time when there was no Board regulation of the names of air carriers. It follows, therefore, that the promulgation of Section 291.28 was not intended to apply to changes in name occurring prior to the adoption thereof. If it were intended to apply to such a change in name, the regulation is invalid on the grounds that (1) North American now possesses a vested property right in such name which the Board may not now abridge; and (2) a denial by [fol. 5] the Board of the application would result in an unlawful modification of the operating license held by North American. In the event the Board holds the regulation to be applicable to North American, the application requests Board authorization for use of such name.

American Airlines, Inc. (American), filed a memorandum on October 17, 1952, requesting denial, alleging that: (1) approval of the application would permit nullification of the cease and desist order Serial No. E-5171 against Oxnard Sky Freight and flouting of the Board's regulatory processes; (2) the name "North American" infringes upon the established name of American, and constitutes unfair competition within the meaning of Section 411 of the Act, and that (3) North American has no vested right or established good will in the name "North American" which the Board is bound to recognize. On November 5, 1952, American

filed "Supplement No. One" to said memorandum, setting forth evidence by way of affidavits that confusion results from the deceptive similarity of the name "North American" to the name "American".

We have considered the foregoing matters, and have concluded that they raise important issues of fact and law which can only be decided after a hearing, as is provided for under the aforementioned regulation. Accordingly, we have decided to defer action on North American's request of March 11, 1952, to institute an investigation to determine whether the use of the North American name by the applicant has constituted or does constitute an unfair or deceptive practice or unfair method of competition within the meaning of Section 411 of the Act, from which practice or method the Board should order North American to cease and desist, and to consolidate that investigation for hearing and decision with North American's application in Docket No. 5774. Pending the Board's final decision in this proceeding the continued use of the North American name by applicant shall not be deemed to constitute a violation of Section 291.28.

Accordingly, it is ordered that:

(1) An investigation, assigned Docket No. 5928, be and hereby is instituted to determine whether North American in engaging in air transportation under the name of [fol. 6] North American Airlines, Inc., North American Airlines, or North American has been and is engaging in activities and practices in violation of Section 411 of the Act, and if any such violation is established, whether the Board should issue an order directing North American to cease and desist from such violations;

(2) Said investigation be and hereby is consolidated for hearing and decision with North American's application, Docket No. 5774, and that said consolidated proceeding be immediately set down for hearing before an Examiner of the Board at a time and place to be hereafter announced;

(3) Action on North American's request of March 11, 1952, be and it hereby is deferred until final disposition of North American's application herein; and

(4) Except to the extent specifically granted herein, the request of American be and it hereby is denied.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan, Secretary.

(Seal)

[fol. 171] BEFORE THE CIVIL AERONAUTICS BOARD

[Title omitted]

EXCERPTS FROM STIPULATION OF FACTS

The following items are stipulated as facts for purposes of this proceeding:

1. American Airlines, Inc. was incorporated in Delaware on April 11, 1934, and commenced business on May 13, 1934 when it acquired all of the assets of American Airways Inc., which had been incorporated January 25, 1930. Since commencing business, American Airlines, Inc. has continuously engaged in the air transportation of persons, property and mail. Pursuant to certificates of public convenience and necessity duly issued under the Civil Aeronautics Act, American Airlines, Inc. is, and has since prior to August 22, 1938 engaged in such air transportation on a regularly scheduled basis between, among other places, New York, Chicago and Los Angeles.

2. Twentieth Century Airlines, Inc. was incorporated in North Carolina on May 4, 1946, and holds a letter of registration as a large irregular air carrier. On March 3, 1952, Twentieth Century Airlines, Inc. amended its articles of incorporation so as to change its name to North American Airlines, Inc. Since on or about April 21, 1951, Twentieth Century Airlines, Inc. has engaged in the air transportation of persons between, among other places, New York, Chicago and Los Angeles under the name "North American Airlines" or "North American."

3. American Lines, Inc. has registered the name "American Airlines" under the Federal Trademark Act,

15 U. S. C. 1051 *et seq.* on the Principal Register (No. 514294) as a service mark used in connection with the furnishing of air transportation. An authentic copy of such registration certificate is reproduced as American's Exhibit AA-3 in this proceeding.

. . . . . .

[fol. 172] BEFORE THE CIVIL AERONAUTICS BOARD

[Title omitted]

EXCERPTS FROM STIPULATION OF DOCUMENTARY MATERIAL

It is hereby stipulated and agreed by and between counsel for the parties and intervenors herein and Bureau Counsel that the following documents and material shall, by this reference, be incorporated into and considered a part of the record in this proceeding:

1. The Official Guide of the Airways for each month prior to April, 1943; the Universal Airline Schedules for each month from April 12, 1943 through September, 1944; the American Aviation Traffic Guide for each month from October, 1944 to and including October, 1948, and the Official Airline Guide for each month prior to and including the date of oral argument before the Board in this proceeding;

. . . . . .

5. Monthly reports, Forms 2380 and 2789, for each month through December, 1946, and monthly and quarterly reports, Forms 41 and 41 (a) filed with the Board by American Airlines, Inc. prior to and including the date of oral argument before the Board;

. . . . . .

7. Airline Traffic Surveys for September, 1946, March, 1947, September, 1947, March, 1948, September, 1948, March, 1949, and any similar surveys issued or made available to the parties by the Civil Aeronautics Board prior to the date of oral argument before the Board in this proceeding;

8. Recurrent Reports of Mileage and Traffic Data, of all Domestic Airline Carriers, 1945-1949, prepared by the Economic Bureau of the Civil Aeronautics Board, and any similar recurrent reports officially released by the Civil Aeronautics Board prior to the date of oral argument before the Board in this proceeding;

. . . . . .

[fol. 173] 11. Letter of March 11, 1952 to the Civil Aeronautics Board advising it of change of name of Twentieth Century Airlines, Inc., to North American Airlines, Inc. and suggesting reissue of letter of registration in new name.

. . . . . .

[fol. 183] BEFORE THE CIVIL AERONAUTICS BOARD

NORTH AMERICAN AIRLINES, INC.

Docket Nos. 5774 and 5928

In the matter of the application of North American Airlines, Inc., for authority to conduct its operations under the name of North American Airlines, Inc., and an investigation pursuant to section 411 of the Act of certain practices of North American Airlines, Inc.

INITIAL DECISION OF WALTER W. BRYAN, EXAMINER

Served: June 19, 1953.

Upon:

Hardy K. Maclay, 1317 F Street, N.W., Washington 4, D.C., for North American Airlines, Inc.

Clifton J. Stratton, Jr., 701 Union Trust Bldg., Washington, D. C., for American Airlines, Inc.

Robert M. Johnson, Office of Enforcement, Civil Aeronautics Board, Washington 25, D. C.

John J. Stowell, Bureau of Air Operations, Civil Aeronautics Board, Washington 25, D.C.

This decision shall become final 10 days after the date of service shown above and shall become effective upon the issuance of a Board order pursuant to Rule 28 of the Rules of Practice, unless within such 10-day period exceptions thereto are filed by one or more of the parties with the Docket Section, Civil Aeronautics Board, Washington 25, D. C., and served upon all other parties. If exceptions are filed within the period prescribed, briefs may be filed and served on all other parties within a further period of 10 days.

[fol. 184]

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

NORTH AMERICAN AIRLINES, INC.

Docket Nos. 5774 and 5928

Concluded:

1. That the use of the name North American, or any combination of the word "American" by Twentieth Century Air Lines, Inc., constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act.

2. That the public interest requires that the application of Twentieth Century Air Lines, Inc., Docket No. 5774, for authority to engage in air transportation under the name North American Airlines be denied.

3. That an order be issued against Twentieth Century Air Lines, Inc., to cease and desist from using the name "American" in any combination of words to designate its name.

Appearances:

Hardy K. Maclay for North American Airlines, Inc.
Howard C. Westwood, Ernest W. Jennes, and Clifton J. Stratton, Jr., for American Airlines, Inc.
Robert M. Johnson, Enforcement Attorney

INITIAL DECISION OF WALTER W. BRYAN, EXAMINER

This proceeding arises as the result of the Board's order serial No. E-7107, dated January 28, 1953, in which it is ordered that an investigation be instituted to determine whether North American Airlines, Inc., formerly Twentieth Century Air Lines, Inc., in engaging in air transportation under the name of North American Airlines, Inc., North American Airlines, or North American, has been and is engaging in activities and practices in violation of section 411 of the Act, and if any such violation is established whether the Board should issue an order directing North American to cease and desist from such violations. [fol. 185] It is indicated in the record that on March 11, 1952, Twentieth Century Air Lines, Inc. (Twentieth Century) advised the Board that the corporate name of Twentieth Century had been changed to North American Airlines, Inc. (North American) effective March 3, 1952, and it requested the Board to change its records accordingly and reissue its letter of registration in the new name.

On August 19, 1952, the Board adopted an amendment No. 7 to Part 291 of its Economic Regulations, effective September 23, 1952. The above amendment added a new section, 291.28, *Business Name of Air Carrier*, which provided:

> "On and after November 15, 1952, it shall be an express condition upon the operating authority granted by this Part and the letters of registration issued hereunder that the air carrier concerned, in holding out to the publ[illegible] and in performing air transportation services shall do so only in a name the use of which is authorized under the provisions of this section.
>
> (a) Except as otherwise provided under paragraph (b) of this section, an air carrier may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith.
>
> (b) An air carrier may do business in such other and different name or names as the Board may by

order permit, upon a finding that the use of such other name or names is not contrary to the public interest. Any such permission may be made conditional upon the abandonment of the use of the name in which its letter of registration is issued and outstanding, in air transportation service by the air carrier concerned, or otherwise be made subject to such reasonable terms and conditions as the Board may find necessary to protect the public interest."

On October 6, 1952, North American timely filed an application under the above regulation for authority to conduct its operations under the name North American Airlines, Inc., in lieu of Twentieth Century Air Lines, Inc. Upon [fol. 186] consideration of this application the Board determined to institute the above described investigation and by its order consolidated the above application, Docket No. 5774, with the investigation proceeding, Docket No. 5928, for hearing and decision.

American Airlines, Inc., (American) was permitted to intervene and participated in the proceeding. A hearing has been held and all parties given an opportunity to file briefs with the Examiner.

Issues.—The issue involved here is whether North American has been or is engaged in unfair or deceptive practices, or unfair methods of competition in air transportation, within the meaning of section 411 of the Act, by the use of the name North American Airlines, Inc., North American Airlines, or North American, and if any violation is established whether North American should be ordered to cease and desist therefrom; also whether the granting of the request in North American's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest.

Twentieth Century Airlines, Inc., was incorporated in North Carolina on May 4, 1946, and holds a letter of registration as a large irregular air carrier. On March 3, 1952, the above carrier amended its articles of incorporation so as to change its name to North American Airlines, Inc. Since on or about April 21, 1951, the above carrier

has engaged in the air transportation of persons between, among other points, New York, Chicago, and Los Angeles, under the trade name of North American Airlines.

American Airlines, Inc., (American) the intervenor in this proceeding, was incorporated in Delaware on April 11, 1934, succeeding American Airways, Inc., which was incorporated under the laws of Delaware on January 25, 1930. American has continuously engaged in air transportation of persons, property, and mail since the above dates and has operated between, among other places, New York, Chicago, and Los Angeles as a scheduled air carrier.

American registered on July 27, 1948, the name "American Airlines" under the Federal Trademark Act, 15 U.S.C. 1051 et seq., on the Principal Register (No. 514294 of [fol. 187] the United States Patent Office as a service mark used in connection with the furnishing of air transportation.

Since 1934 American has concentrated in its advertising the names "American" and "American Airlines" with the purpose of creating in the public mind an identity between the name American and its air transportation service. There were introduced in evidence samples of such advertising as "American Leading Airlane," "Better by Air," "Best by American," "American to Detroit the Most Frequent Service," "American to Washington $98 via DC-6 Airtourist Service," "American to New York 11 Nonstop Flagships," and "American's Convairs Are Coming."

The above type of advertising has appeared weekly on 251 billboards and in 142 newspapers throughout the country with a combined circulation of approximately 28,000,000. American has spent in excess of $2,250,000 for the above type of advertising since 1949.

American has also advertised extensively in magazines and during the period between 1948 and 1952 it spent approximately $3,800,000 for such advertising. It also advertises in the various cities served by American by means of display signs appearing at airports and in other public places. In 1940 American produced a sales movie entitled "The American Way," which has been shown to groups throughout the country, depicting its service and the com-

fort, speed and convenience of air travel. American is currently spending on newspaper and biliboard advertising approximately $600,000 annually.

An officer of American in testifying stated that in his opinion the extensive advertising of American service as being the leading airline in American air commerce had been accepted by the traveling public. He further stated that much of American's advertising is devoted to identifying American with a certain route structure and with a certain type of superior equipment.

The direct evidence of record consists of testimony of witnesses who, for the most part, are employed by American as ticket and reservation agents located at Los Angeles, Burbank, Chicago, and New York. There were also affidavits and written statements from ticket and reservation [fol. 188] agents received in evidence for the purpose of establishing whether the names "American" or "American Airlines" and "North American" or "North American Airlines" are confusing to the traveling public.

The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

An officer of American testified that he had received from employees under his supervision numerous inquiries indicating confusion between American Airlines and North American Airlines, and that his office had received numerous requests for collect telephone calls from people who were attempting to contact North American. It was established that American did not receive collect calls while North American did. The same witness stated that his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explana-

tion had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a "Buyers League Scrip Book." Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at [fol. 189] Los Angeles concerning an $80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it was found that it was North American they were referring to and not American. One witness testified that she had heard people state that they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North American. There were instances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have dunned American for bills owed by North American and hotels have requested American's advice as to billing for hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to "steal" them.

There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question.

The witnesses who appeared and testified on behalf of North American were ticket agents from Burbank and Washington, D.C. Their testimony was to the effect that they had not experienced any great degree of confusion on the part of the public involving the similarity of names between American and North American. The agent at Burbank stated it was a common occurrence at his counter for persons to inquire about the services of other carriers [fol. 190] such as United and particularly the services of North Star—in fact, the witness had noticed a certain amount of confusion existing on the part of the public between North American and North Star. Another witness for North American stated that his experience had been that the majority of customers made inquiries concerning destinations of the various carriers and were not particularly confused about the similarity of names of the carriers.

Discussion.—Section 411 of the Civil Aeronautics Act empowers the Board to determine whether any air carrier or ticket agent has been engaged or is engaging in unfair or deceptive practices, or unfair methods of competition in air transportation or the sale thereof, and if such is found to exist the Board is empowered to order discontinuance of such practices.

This case finds no precedent in the Board's decisions. Therefore, one must look for guidance to the decisions of the courts in their application of unfair trade practices as set forth under section 5 of the Federal Trade Commission Act, which is essentially the same as section 411 of the Civil Aeronautics Act. The Federal Trade Commission has been given the jurisdiction by statute over unfair competition in the common law sense of the term and also under the statutory language as defined "any unfair method of competition or unfair or deceptive *act* or practice in commerce." It is noted that the word "act" in the Federal

Trade Commission Act has been omitted in section 411 of the Civil Aeronautics Act.

The courts have said that the unfair trade practice law is for the protection of the public and not for the experts, but rather for "the vast multitude which includes the ignorant, the unthinking, and the credulous, who in making purchases do not stop to analyze but are governed by appearance and general impressions."[1]

The most common form of unfair competition is the imitation of a trade name, trade symbol, or device by a competitor. This may be a family name or the name of a corporation, labels, or deceptive packaging. In the early [fol. 191] history of trade relationship as indicated by the early legal cases, it included unfairness, dishonesty, taking unfair advantage of a rival, misrepresentation, and defrauding the public. It is also noted that running through all of these early cases were the ethical element standards.[2] One of the first court cases involving a trade-mark or trade name in American courts was *Taylor* v. *Carpenter*, 3 Story 458, in which an English concern complained that the name and other distinguishing devices on its spools of thread had been copied. Judge Story said that the case was one of unmitigated and designed infringement of the rights of the plaintiff for the purpose of defrauding the public and taking from plaintiff the fair earnings of their skill, labor and enterprise.

As heretofore stated, the name under which one does business may be a family name, a descriptive name, a fanciful name, or a geographical name. In this case the word "American" is used to designate a particular airline and as such is subject to exclusive use, although it is a geographical term. The courts have held that where the use of a name has been given significance or other meaning, such meaning is called a "secondary meaning" and the statute of unfair competition gives such name a property right.[3]

---

[1] See *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 F. 73; *Stork Restaurant, Inc.* v. *Sahati et al.*, 166 F. 2d 348.

[2] 2 Mims' Unfair Competition, 4th ed., 1947.

[3] *Standard Paint Co.* v. *Rubberoid Roofing Co. et al.* 224 F. 695.

In the case of *Hudson Tire Co., Inc.* v. *Hudson Tire & Rubber Corporation et al.*, 276 F. 59, the court stated that the word "Hudson" as applied to tires had obtained a secondary meaning, referring to plaintiff's merchandise, and the fact that defendant had secured its corporate name from the State of New York did not authorize it to use the name "Hudson" in connection with such merchandise.

The courts have likewise held that in looking for a secondary meaning in a trade-mark, it is controlled by the fact that such a meaning has been acquired in the minds of the public rather than by the time it has taken for that fact to be established.[4]

Another case in point is that of *American Products Co.* [fol. 192] v. *American Products Co.*, 42 F. 2d 488. It is noted that one of the above companies was a Delaware corporation and the other one a Michigan corporation. The court said in part:

> "Assuming, for the purposes of this opinion, that the name 'American Products Company' should be regarded as a geographical name indicating products made in America, rather than a somewhat fanciful name not intended to denote the place of manufacture of such products, it is well settled that when a person has adopted, as the name of a business, a term originally geographical, and, by his efforts and expenditures, has developed a reputation and good will for such business and its products, so that such name has come to mean, in the minds of the general public, that particular business and its products, such name thereby acquires a secondary meaning, as indicating such business, and its owner is entitled to protection, in its use, by a court of equity."

In the case of *American Radio Stores, Inc.* v. *American Radio and Television Stores Corp.*, 150 A. 180, the court stated:

> "Those words (radio and stores) are purely descriptive and, when used by the complainant, have at-

---

[4] *Barton et al.* v. *Rex-oil Co., Inc.*, 2 F. 2d 402.

tached to them no meaning of a secondary nature. But when the word "American" is used in conjunction with them, a distinguishing mark is introduced and the complainant is entitled to be protected in its use of that distinctive feature of its name."

In the case of *Delaware L. & W. R. Co.* v. *Lackawanna Motor Freight Lines*, 175 Atl. 905, the court held that the rights of the plaintiff were based on a secondary meaning acquired by its use in the transportation business, and its use by defendant was a device to deceive the public, although the court held that fraudulent intent need not necessarily be shown to invoke the aid of the court.

Another case in point is *American Thread Co.* v. *North* [fol. 193] *American Thread Co., Inc.*, 33 F. Supp. 616, where the court held that a newcomer operating under a similar name to a company already in the business was an act of unfair competition.

Another pertinent case is that of *Womble* v. *Parker*, 67 S.E. 2d 133, which involved a newcomer into a business wherein it attempted to advertise its products under a trade name similar to one already in use by its long-established competitor. The court said, in part:[5]

"While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trade-marks or trade names, such names and words when used so long and exclusively by a trader, manufacturer or producer that they are generally understood to designate his business or merchandise, may acquire a secondary signification or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protec-

[5] Other cases in point are: *Phillips* v. *The Governor & Co. of Adventurers of England trading into Hudson Bay*, 79 F. 2d 971; *Lincoln Motor Co. et al.* v. *Lincoln Automobile Co.*, 44 F. 2d 812; *Finchley, Inc.* v. *Finchley Co., Inc.*, 40 F. 2d 736; *Western Auto Supply Co.* v. *Knox*, 93 F. 2d 850.

tion against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade name or trade-mark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of another."

It is clear from the foregoing that a geographical term used in a business name may acquire a secondary meaning by actual use and upon which the owner may create goodwill in its business relationship with the public. Thus such a name becomes a valuable asset and a business advantage. [fol. 194] Therefore, in such instances the trade name becomes of a pecuniary value or a property right, and the courts have consistently held that such rights are entitled to the protection afforded by the courts.

There can be no dispute that American Airlines is the prior user of the name "American" as between it and North American, as American has used the above name since 1934 and its predecessor used the name prior to that time, whereas North American has used its name only since April 1951. American has consistently over the years promoted the use of the term "American" in its advertising and public relation work. Since 1948 American has spent over $6,000,000 for advertising in newspapers and magazines alone. Respondent argues on brief that in order for the term "American" to have acquired a secondary meaning as used by American Airlines it must have been exclusively used during the entire period in which the secondary meaning was being established, and the respondent further argues that American was not the exclusive user of the name "American" during this time.

The courts have held that to establish a cause of action for unfair competition it is not necessary to prove an exclusive right in plaintiff, i.e., that no one else has used the trade name in the past or that no one else is presently using it—rather the issue is what does the trade name as used by the owner mean to the public.[4] The public has

[4] *Thomas A. Edison, Inc.* v. *Shotkin*, 69 F. Supp. 176.

accepted the term "American" in air transportation as meaning American Airlines, Inc., and the fact that other airlines may or may not have used the word "American" as constituting a dominant part of their business name is of no significance in this proceeding.

Upon consideration of all the facts, and in view of the court decisions pertaining thereto, it is concluded that the name "American" and "American Airlines" used in connection with air transportation has acquired a secondary meaning as identifying American Airlines, Inc.

The Supreme Court has said that the aim in the use of trade-marks is to convey to the minds of the public, [fol. 195] or potential customers, the desirability of the services or commodity upon which the mark appears, and once this is attained the trade-mark becomes something of value and whatever tends to dissociate the trade name or mark in the public mind from the goodwill it identifies lessens its value and may destroy it altogether.[7] Since it has been concluded that the trade name "American" used by American Airlines has acquired a secondary meaning and that good-will has been created in the use of that name, it appears that such name is entitled to protection against its use by another person engaged in air transportation under a similar name which would have a tendency to confuse the public.

One of the important factors in a case of this kind arising under section 411 is whether the public is being deceived or confused and thus affecting the public interest in air transportation. The court stated in the case of *Anheuser-Bush, Inc.* v. *Budweiser Malt Products Corporation*, 287 F. 243, that the fundamental question in cases of trade-marks or unfair competition is whether the public is being misled and deceived so that the defendant is in effect taking advantage of the good-will and business reputation of another who has built it up through service or advertising.[8]

There are numerous examples in the record indicating confusion between American and North American Airlines

---

[7] See *Mishawaka Rubber & Woolen Manufacturing Co.* v. *S.S. Kresge Co.*, 316 U.S. 203.

[8] See *United Drug Company* v. *Theodore Rectanus*, 248 U.S. 90.

on the part of the public. A number of witnesses who were ticket or reservation agents for American testified that they had received numerous inquiries from the public, indicating to them that confusion existed in the minds of the persons making the inquiries. Each agent for American in the Los Angeles area that testified stated he had received on an average of two or more such inquiries per week, and it is reasonable to assume that the other employees in that area received an equal number of inquiries, [fol. 196] which would make the total over 200 per week in the above area alone, not to mention the other points located on American and North American's systems.

Respondent has raised the point as to whether inquiries contained in sworn affidavits by American employees should be given any consideration since, for the most part, such evidence is hearsay and the respondent was not given an opportunity to cross-examine the person making the statement. The above evidence was not offered to prove the truth of such statements but rather the extent of confusion which may exist in the minds of members of the public. The mere fact that such inquiries were made is some indication that the persons making the inquiries must have been confused by the similarity of names.

The courts have consistently held that such evidence in cases involving infringement of trade-marks is admissible. In the case of *S.C. Johnson & Son, Inc.* v. *Johnson*, 28 F. Supp. 744, the court said:

> "There is considerable testimony which has been offered by the plaintiff purporting to show inquiries made by prospective purchasers. It is objected that such inquiries are hearsay. Without this type of proof, it would be difficult to show confusion. It seems to me it is competent as showing the state of mind of the prospective purchaser."[9]

As to whether the incidents included in the affidavits submitted in evidence were made by passengers or prospec-

---

[9] See also *United States* v. *United Shoe Machinery Corporation*, 89 F. Supp. 349; *Federal Trade Commission* v. *Cement Institute et al.*, 333 U.S. 683.

tive passengers on either of the two airlines involved is of no significance since a part of the entire public are prospective passengers at one time or another. The courts have held that misdirected mail or complaints between companies with similar names was evidence of confusion.

The type of inquiries indicating confusion involved in this proceeding, which have heretofore been discussed, is [fol. 197] typical of those occurring to the average member of the public. Naturally, such inquiries were not made by persons who are frequent travelers by air or well informed on aviation matters but rather the uninformed, and it is the interest of the uninformed that the Board is required to protect from confusion because of similarity of names.

There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good-will and business reputation of American, or that American has been injured by such operation. Such evidence is not required to support a finding of unfair competition. The courts have consistently held that in cases involving violation of trade-marks the right of injunction depends not on the fact that the purchaser has been deceived but rather on the fact that the public may be deceived if such acts of confusion are permitted to continue. The proof that confusion has already existed adds to the likelihood of continued deception.[10]

There is no question but what American has acquired during the past 20 years through its constant efforts a good-will in its use of the name "American" or "American Airlines," which has become a valuable asset to be protected. However, an action for infringement of American's trade name can find its remedy in the courts. Section 411 was not designed for the purpose of protecting the private

---

[10] *J. C. Penney Co.* v. *H. D. Lee Mercantile Co.*, 120 F. 2d 949; *Ralston Purina Co.* v. *Saniwax Paper Co. et al.*, 26 F. 2d 941; *Wisconsin Electric Co.* v. *Dumore Co.*, 35 F. 2d 555; *Henry Muhs Co.* v. *Farm Craft Foods, Inc. et al.*, 37 F. Supp. 1013; *United Drug Co.* v. *Obear-Nester Glass Co.*, 111 F. 2d 997; *Pep Boys—Manny, Moe & Jack, Inc.* v. *Federal Trade Commission*, 122 F. 2d 158. *American Home Benefit Assn., Inc.* v. *United States Benefit Assn., Inc.*, 125 P. 2d 1010; *United Lace & Braid Mfg. Co.* v. *Barthels Mfg. Co.*, 221 F. 456.

rights of an individual carrier except to the extent of regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important, [fol. 198] the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition.

North American is a newcomer in the field of air transportation as compared to American's operations; and it should have known that the similarity of names between North American and American would have the capacity to confuse the public as to the true identity of the carriers. There are numerous instances of record where the public has been confused and inconvenienced by this similarity of names. The courts have consistently upheld the public interest as being the foremost issue in cases involving violation of trade-marks and have granted injunctive relief without proof of fraud, deception, or injury to the owner of the trade-mark.

The task would not have been a difficult one for North American to have adopted another trade name which was different from the names of other air carriers in operation and thereby avoid the tendency on the part of the public to mistake one carrier for the other.

In view of the public confusion which has arisen and may increase in the future as air transportation becomes a more accepted mode of travel, and the services rendered by the carriers become more alike as well as the aircraft itself, it is in the public interest that the identity of the carrier be readily distinguishable by the public. Therefore, the continued use of the name "North American" by Twentieth Century is so similar to the trade name "American" as used by American Airlines, Inc., as to constitute an unfair and deceptive practice as well as an unfair method of competition, and it is so found.

In order further to protect the public interest against such unfair methods of competition it is found that a cease and desist order should be issued by the Board against the use of the name "North American" by Twentieth Century in the manner hereinafter set forth.

Findings.—In view of the foregoing and in consideration of all the facts of record, it is found:

1. That the use of the name "North American Airlines, Inc.," "North American Airlines," "North American," or [fol. 199] any combination of the word "American" by Twentieth Century Airlines, Inc., constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act.

2. That the public interest requires that the application of Twentieth Century Airlines, Inc., Docket No. 5774, for authority to engage in air transportation under the name North American Airlines, Inc., be denied.

3. That a cease and desist order be issued against Twentieth Century Airlines, Inc., its successors, assignees, representatives, agents, officers, and employees, to cease and desist doing business in air transportation under the name North American Airlines, Inc., or any variation of the name "American."

* * * * * * * *

E-7870

BEFORE THE UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

Served: Nov. 4, 1953

Docket Nos. 5774 and 5928

North American Airlines Section 411 Proceeding

North American Airlines, Inc. (Twentieth Century Airlines, Inc.) ordered to cease and desist from engaging in air transportation under the names "North American," "North American Airlines," "North American Airlines, Inc.," or any combination using the word "American."

Appearances:

Hardy K. Maclay and Walter D. Hansen for North American Airlines, Inc.

Howard C. Westwood, Ernest W. Jennes and Clifton J. Stratton, Jr., for American Airlines, Inc.
Robert M. Johnson, Enforcement Attorney.

[fol. 200] OPINION—Decided November 4, 1953

By the Board:

This proceeding involves an investigation instituted by the Board to determine whether North American Airlines, Inc., formerly Twentieth Century Airlines, Inc. (respondent) has been and is violating Section 411 of the Act by engaging in air transportation under the name North American Airlines, Inc., North American Airlines, or North American.[1] The order instituting the investigation consolidated into it an application by respondent, filed under section 291.28 of the Economic Regulations, for authority to conduct its operations under the name North American Airlines, Inc., rather than as Twentieth Century Airlines, Inc., the name in which respondent holds its letter of registration as a large irregular air carrier. American Airlines, Inc. (American) was granted leave to intervene.[2]

After due notice a public hearing was held before Examiner Walter W. Bryan who has issued his Initial Decision. In it he found (a) that respondent's use of the name North American Airlines, Inc., North American Airlines, North American, or any combination of the word American constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of section 411 of the Act, (b) that the public interest requires denial of respondent's application to engage in air transportation under the name North American Airlines, Inc., and (c) that respondent, its successors, assignees, representatives, agents, officers and employees should be ordered to cease and desist from engaging in air transportation under the name North American Airlines, Inc., North American Airlines, North American, or any combination of the word American. Respondent has excepted to the

[1] Order No. E-7107, dated January 28, 1953.
[2] Order No. E-7174, dated February 19, 1953.

Initial Decision.[3] The Board has heard oral argument, and the case now stands submitted for decision.

[fol. 201] Upon consideration of the entire record, we agree with the Examiner's ultimate findings as set forth above. Those portions of his Initial Decision which we adopt as our own are attached hereto as an appendix. We shall discuss herein some of the contentions raised in respondent's exceptions, and in so doing we shall supplement the findings and conclusions contained in the appendix.

1. Respondent presents several exceptions attacking the sufficiency of the evidence of record to establish that respondent has caused substantial public confusion between itself and intervenor by using the names North American, North American Airlines, or North American Airlines, Inc. The Examiner found that such confusion exists by reason of the similarity between North American and the word American as used by intervenor. We concur in this finding. In addition, we find that substantial public confusion exists due to similarity between respondent's names and the name American Airlines. Evidence supporting these findings is partially summarized in the appendix. We have examined the evidence in the light of respondent's attacks upon both its weight and its admissibility, as discussed below, and have determined that the record amply supports our findings.

Respondent assails both the admissibility and the weight of evidence of confusion introduced in the form of written statements by certain American reservations and ticket office employees who were not called as witnesses. It is true that virtually all of the evidence of public confusion in the Chicago area is of this nature. But the finding of substantial confusion is required by the abundant testimony and written statements as to public confusion in the New York and Los Angeles areas personally observed by at

---

[3] Respondent has filed a brief in support of its exceptions. American filed a statement in lieu of exceptions approving the Examiner's ultimate findings, with a brief to the Board in support of its position. Counsel for the Board's Office of Enforcement filed no exceptions but requested the Board to consider his brief to the Examiner.

least seven[4] witnesses who were extensively cross-examined [fol. 202] upon their testimony and statements. In finding substantial public confusion, we do not depend or rely upon the corroborative value of the evidence respondent thus assails. Indeed, all our findings and conclusions in this proceeding are based only upon evidence given by persons appearing as witnesses and available for cross-examination.

2. Respondent contends that the Examiner improperly relied upon evidence of confusion on the part of persons who were not shown to have been prospective buyers of air transportation at the time they evinced confusion. Such evidence related to attempts of merchants, hotels, and others to hold American Airlines answerable for the obligations or acts of respondent. Respondent views our inquiry as confined to the question of whether *shoppers for air travel* will be confused, and asserts that such confusion is not established by the evidence in question.

Even assuming that our concern is directed only to confusion of prospective passengers,[5] evidence of confusion of members of the public not so identified does not lack probative force. There is no reason to believe that those who as creditors confused respondent with intervenor are more prone to such confusion than prospective air travellers. The evidence here challenged by respondent corroborates the direct evidence of confusion on the part of the travelling public. Indeed, such creditors may be themselves prospective air travellers.

3. The bulk of the confusion shown in the record was on the part of persons reasonably identified as prospective or actual purchasers of air transportation. In attacking this evidence, respondent argues that the showing of confusion

---

[4] Witnesses Newkirk, Perry, Rowley, Avery, Heide, Houck and Reynolds; also witness Burg.

[5] Obviously the public to whose interests we must look herein does not consist solely of individuals contemplating purchase of air transportation. For, example, the record shows that a person whose sole transportation interests at the time may lie in the journey of another can experience considerable inconvenience if under a misapprehension as to the carrier's identity and time and place of arrival.

due to similarity of names actually represented confusion which the witnesses had imputed to, rather than observed [fol. 203] in, the public. Respondent claims that the public behavior observed by these witnesses, properly interpreted, indicates either (a) no confusion on the part of the traveller or caller at all, (b) confusion involving some carrier other than respondent, or (c) confusion between respondent and intervenor not attributable to a similarity of names.

(a) The record contains few instances where it would be reasonable to conclude that the caller was not confused at all. Respondent would so describe persons who presumably were trying to telephone respondent but who in fact telephoned American possibly because of a wrong number. But absent a showing of a confusing similiarity of telephone numbers, receipt by American of telephone calls intended for North American is itself some evidence of a confusion due to similarity of names. Respondent also regards as not confused persons who apparently called American intentionally and who, according to respondent, did so merely because they regarded American as a good source of desired information. While there is no dispute that such calls are received by American, very few of the instances described by the witnesses were even arguably of this nature.[6] The evidence as a whole is convincing that in almost all instances offered to show confusion of the public, confusion was definitely or very probably present.

(b) In certain instances respondent does not deny that confusion may have been present, but argues that the caller or traveller whom the witness observed may have confused American with some air carrier other than North American. This argument is inapplicable to a major portion of the cases reported by the witnesses, because the conduct of the persons observed directly exhibited that North American was involved. The argument is unpersuasive in other

[6] This finding is made with full cognizance of certain evidence in the record showing that intervenor does receive general inquiries regarding air transportation where there is no confusion. Respondent improperly attempts to classify as inquiries of this character requests which we conclude involve confusion.

instances which were indirectly linked to North Ameri-
[fol. 204] can by references to North American flight numbers or advertising, including in one case the name of a radio entertainer sponsored by respondent. It is true that the link to respondent is imperfect where it consisted merely in references by the caller to special fares, particular destinations and distinctive features of service shared by carriers other than respondent. However, such cases are overshadowed by the evidence in which North American's role in the confusion is obvious.

(c) Respondent disputes the causal relationship between the similarity of names and the public confusion between the carriers using such names. Respondent cannot successfully challenge such a relationship on this record. That there is in fact a similarity between the names of respondent and intervenor is obvious, and where the evidence shows members of the public have confused respondent with intervenor, the implication is strong that such confusion flows from the similarity. The record will not permit us to draw a contrary inference. It has not been shown that comparable public confusion exists between intervenor and a carrier with a clearly dissimilar name, nor between respondent and a carrier with a clearly dissimilar name. Moreover, respondent is unable to point to any prevailing circumstance more likely than the similarity of the parties' names to account for the confusion between itself and intervenor. In one case, in which a letter addressed to American Airlines at the Lockheed Air Terminal in Burbank, California, was misdelivered to respondent's counter at the same terminal, respondent urges as the probable reason that the letter bearing the name of an American Airlines' employee, Miss Newkirk, beneath that of American Airlines, was misdelivered because respondent also had an employee named Newkirk. But this single instance affords respondent little aid in view of the evidence that there were other instances of letters both misdelivered and misaddressed as between American Airlines and North American. In these cases there was no evidence of similar personal names, and the conclusion that the similarity in the carriers' names was the causal factor can hardly be avoided.

4. Respondent contends that any instances which may [fol. 205] show a confusing similarity of names are too few to support a finding that such confusion is substantial or widespread. Respondent attacks a statement of the Examiner that it would be reasonable to assume on the basis of the evidence that American Airlines' personnel in the Los Angeles area receive 200 inquiries a week involving confusion on the part of the public. Respondent asserts that the evidence shows there were 8 instances a week of all-gedly confusing inquiries received by American Airlines in that area, including only one which respondent concedes may have in fact involved actual confusion due to similar names. Respondent thus contends that any confusion caused by the similarity of names is *de minimis*.

The fact is that such confusion has been shown by the evidence of record to be substantial. We need not determine whether to endorse the precise numerical estimate of the Examiner, but we must reject respondent's assertion that American Airlines' Los Angeles personnel received only 8 inquiries per week involving confusion. That figure refers to certain reports by American Airlines' personnel committed to writing under the instructions of their supervisor who testified that for some time past instances of confusion with respondent had been frequently brought to his attention by his subordinates. He also testified that the reports, including those made by other witnesses, were representative of such instances; that some reports which he did not consider completely illustrative of the problem were discarded; that the instructions did not call for reporting all instances as that would have been an impossibility, since the personnel in question were busy answering telephones and handling ma-y customers; and that his instructions called for reports of specific instances of unusual confusion or of a particular type of confusion which had happened repeatedly. The testimony of the American Airlines' ticket counter and telephone reservation personnel in Los Angeles and New York indicates the frequency of the confusion, or of one particular type of confusion, observed by individual witnesses as daily, practically daily on the night shift, three or four times a week, five or six in a five-day week, three or more a week, etc.

[fol. 206] Such indications are cumulative rather than duplicative as to number, and since the witnesses testified as to observations made in work performed by them as a part of a much larger force also so occupied, their observations can be taken to represent only a small part of such occurrences. This is confirmed by the testimony of American's supervisory witnesses from New York and Los Angeles, that public confusion involving respondent had come to their attention for some time as a problem which they encountered as supervisors.

5. Respondent has taken the position that, apart from the question of confusion, we cannot find a violation of section 411 herein because the word American as used by intervenor in air transportation did not acquire a secondary meaning referring to intervenor. We concur in the Examiner's finding and conclusion to the contrary. The evidence establishes that intervenor has long engaged in extensive advertising of its services in the name of "American". This practice has helped to instill in the minds of the public the notion that the word "American" when used in connection with domestic air transportation denotes American Airlines. This is dramatically illustrated by the fact that intervenor has been and is commonly referred to in news items in the public press as American. Where, as here, the record shows that the public press identifies "American" with the intervenor, and believes that the reading public makes the same identification, we find strong evidence of secondary meaning in the word "American."

In finding the secondary meaning, we have not overlooked the recent use of the word American in the name of the sectional local service carrier All American Airways, which has since changed its name to Allegheny Airlines. Nor have we overlooked the recent use of the word American in the name of the irregular carrier Air America, against whom an enforcement proceeding[7] involving its name is now pending before us. We have also considered the use of American in the name Pan American World Airways. There, the use occurred in the separate field of international

[7] Docket No. 6078.

[fol. 207] and overseas air transportation, from which intervenor is wholly excluded except to the extent of serving Mexico City. The fact that intervenor in its long history of extensive advertising may have, at times, emphasized the word "flagship" more than it emphasized its name does not destroy the continuity of its use of that name. There is no doubt that the word American, used in connection with domestic air transportation, is widely known as meaning the intervenor, and that the phrase American Airlines is also understood to refer to intervenor and not to denote the airlines of this nation or continent generally.

Even if respondent were correct in its arguments as to secondary meaning, we do not interpret section 411 so that respondent would prevail. We do not believe that in a case like the present, secondary meaning must be proven in order to protect the public against a clearly demonstrated and substantial public confusion. And this is certainly true where, as here, respondent has adopted a corporate name confusingly similar to the earlier adopted corporate name "American Airlines."

Respondent asserts that its use of its name has not been shown to have been fraudulent. Respondent did not commence and develop its operations as North American Airlines under circumstances of time, place, or nature and scale of operations in which confusion with intervenor would have seemed a remote prospect, but rather changed its name from Twentieth Century Airlines to North American Airlines at a time when American Airlines was universally known in air transportation circles and when operations between major cities served by American must have loomed large in respondent's contemplation of its future activities. Under the circumstances, it was obvious that the similarity of names might well cause confusion. Respondent must be presumed to have intended the reasonably foreseeable consequences of its own acts. We find that respondent's use of a confusingly similar name was not accidental or inadvertent, but rather was knowing.*

---

* There is some evidence which, literally read, would support a finding that respondent used its name in order to secure for itself prospective passengers of intervenor. Moreover, there is other evi

[fol. 208] We are well aware that an order requiring respondent to cease and desist using the name under which it has been engaging in air transportation is a serious sanction which necessarily involves disturbance and loss to the carrier. We do not impose such a measure lightly. But the record is convincing that the public interest requires this action in order to prevent further public confusion between respondent and intervenor due to similarity of names. The maintenance of high standards in dealing with the public is expected of common carriers, and the public has a right to be free of the inconveniences which flow from confusion between carriers engaging in the transportation of persons by air. The speed of air travel may well be diminished when passengers check in for flights with the wrong carrier, or attempt to retrieve baggage from the wrong carrier, or attempt to purchase transportation from the wrong carrier, or direct their inquiries to the wrong carrier. Friends, relatives or business associates planning to meet passenge-s or seeking information on delayed arrivals are subject to annoyance or worse when confused as to the carrier involved. The proper handling of complaints from members of the public is impeded by confusion as to the carrier to whom the complaint should be presented. The transportation itself may differ from what the confused purchaser had anticipated (e.g., in terms of equipment), [fol. 209] even though the time and place of arrival may be about the same. It is obvious that public confusion between air carriers operating between the same cities is adverse to the public interest, and we have determined that the public should be protected from the effects of the confusion shown

---

dence, introduced by respondent, clearly showing the regular use by respondent of misleading advertising concerning itself. This evidence shows that respondent's radio commercials regularly contain the words "North American—one of the nation's four great airlines". Clearly the word great, used to describe a commercial enterprise such as an airline, would normally be understood in its usual sense of big or large. By no objective criteria is the quoted claim, so interpreted, even close to being true of respondent. American Airlines, however, by most if not all tests of size is in fact one of the four largest domestic air carriers, a group commonly referred to as the "Big Four".

on the record by eliminating what we find to be the cause of such confusion.[9]

We have considered the remaining contentions of respondent in support of its exceptions and find them without merit.[10]

[fol. 210] Respondent also excepts to the Examiner's statement that the courts have consistently upheld the public in-

---

[9] Respondent cites certain orders issued in Docket No. 4776 (Ralph Cox, Jr. d/b/a Ocean Air Tradeways) as a precedent under section 411 to the effect that actual injury to the intervenor must be shown before the Board can act under that section. We do not so read these orders (Nos. E-4990 of December 29, 1950, E-5897 of November 28, 1951, and E-6778 of September 10, 1952), for it appears that the complainant in that case, Overseas National Airlines, proceeded on a claim of purely private rights but failed to allege facts showing any injury from violation of such rights. Furthermore, substantially all of the business of the other carrier, United States Overseas Airlines, was under contracts with the military establishment, rather than with the general public. These orders by no means imply that where the public interest may be adversely affected by a confusing similarity of names the Board before acting under section 411 will require a showing of actual injury to the private complainant who asserts a right in such a name.

[10] Respondent excepts to the Examiner's statement that the issues herein include the question of whether granting respondent's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest. Respondent asserts that under the order instituting the investigation the sole issue was stated to be the violation of section 411 by the use of the name North American, etc., that this delineation of the issues was reaffirmed both in an order denying intervenor's motion to clarify and broaden the issues and in the prehearing conference report, and that the Examiner's addition of a new issue after hearing deprived respondent of notice. There is no doubt that respondent's application was consolidated herein by the order initiating the investigation under section 411 (No. E-7107 of January 28, 1953) and was referred to as such in the prehearing conference report. However, we agree with respondent that the only issue in this proceeding is whether there has been a violation of section 411. For, under the regulation regarding change of name under which respondent's application was filed, as interpreted by the order initiating the investigation mentioned above, a denial of the application may be ordered only if a violation of section 411 is shown. Thus the issues under respondent's application and the Board's order of investigation herein are identical.

terest as being the foremost issue in cases involving violation of trade-marks and have granted injunctive relief without proof of fraud, deception or injury to the owner of the trade-mark. We have not adopted the Examiner's statement and accordingly need not comment further on that subject.

Accordingly, in view of the foregoing and upon consideration of the entire record we find:

1. That American Airlines and North American Airlines are in competition in air transportation;

2. That American Airlines was incorporated under that name before North American adopted the trade name of, or changed its corporate name to, North American Airlines; that the term "American" had acquired a secondary meaning before North American adopted that trade name or so changed its corporate name, and such secondary meaning continues to exist;

3. That the substantial public confusion found herein is likely to continue;

4. That the use by respondent of the name "North American Airlines, Inc.", "North American Airlines", "North American", or any combination of the word "American" [fol. 211] constitutes an unfair or deceptive practice and an unfair method of competition within the meaning of Section 411 of the Act;

5. That the public interest requires that the application of respondent, Docket No. 5774, for authority to engage in air transportation under the name North American Airlines, Inc., be denied;

6. That respondent and its successors, assignees, representatives, agents, officers, and employees should be ordered to cease and desist from engaging in air transportation under the name "North American Airlines, Inc.", "North American Airlines", "North American", or any combination of the word "American".

An appropriate order will be entered.

Ryan, Chairman, Denny, Vice Chairman, Lee and Gurney, Members of the Board, concurred in the above opinion. Adams, Member, filed the attached dissenting opinion.

Adams, Member Dissenting:

I dissent from the action taken by the majority since I do not agree with their application to this case of the law of unfair competition nor with the particular sanction they have imposed upon North American Airlines, Inc. I feel that neither our Office of Enforcement nor the intervenor, American Airlines, Inc., has successfully borne the burden of proving the existence of unfair competition since in my view, although some public confusion has been demonstrated, I do not agree that it is substantial, or more than temporary.

As I read the leading cases on the subject of unfair competition I feel that the error made by both the examiner and the majority arises from their tendency, on the one hand, to ignore the basic common law of competition and that of secondary meaning; while on the other hand they over emphasize the gullibility of the average purchaser in this country and magnify the significance and degree of public confusion shown on the record of this case. With this as a basis, the majority concludes that the name "American" has acquired a secondary meaning in the public mind, denoting only American Airlines, Inc.; that sub-[fol. 212] stantial public confusion exists and is likely to continue; and that, therefore, American Airlines, Inc., must be protected from the use by respondent, North American Airlines, Inc., of the word "American" as any part of its business name.

Since American Airlines, Inc., carries approximately 5½ million passengers each year over its system, I am not impressed with the fact that witnesses in this case (principally those employed by American Airlines itself) have testified that some confusion has existed between the services offered by American, on the one hand, and North American on the other. On the contrary, I would be greatly surprised, (in view of the several million phone calls and other communications which American Airlines re-

ceives every year over and above those received from passengers which it actually carries) if there were not *some* demonstrable public confusion between American Airlines and the respondent in this case. As I read the law, however, a new "competitor" is not required to insure against any and all confusion which its entry into the field may cause to certain uninformed purchasers.

When considered in the light of the facts before us in this case, the following excerpts from court decisions bearing on the matter of public confusion and the extent of that confusion required to support injunctive relief are pertinent:

> "The issue in such a case as this is 'whether an appreciable number of prospective purchasers of the goods . . . are likely' to be confused. 'That a few particularly undiscerning prospective purchasers might be so misled is not enough.'"
>
> *Eastern Wine Corp.* v. *Winslow Warren Ltd., Inc,* 137 F. 2d. 955, 960 (1943).

In the *Life Savers Corp. Case*,[1] just as in the case before us, some confusion was actually shown. The Circuit Court, however, quoted the trial court and agreed that ". . . it is [fol. 213] just as probable that the confusion can be attributed to the size and shapes of the various packages as to the exact wording and coloring of the labels". In that same case, in view of the tremendous volume of sales the court said, "It would be extraordinary if some confusion could not be found irrespective of the details of the dress of the package".

Although both the examiner and the intervenor here have cited the *Florence Manufacturing Case*[2] and the language therein to the general effect that the ignorant, unthinking and credulous public must be protected by the law of unfair competition, other authoritative cases take a different view. The *same court* which decided the *Florence Case* had the following to say 33 years later on the matter of unduly protecting the interest of the businessman:

---

[1] *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F2d 4, 8 (1950).

[2] *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 F. 73 (1910).

"The failure to keep constantly in mind the diver's policy considerations which, in this legal province, come in conflict with one another and the consequent occasional over-emphasis on but one of them—the protection of the interest of the businessman who has built a business around a name—has sometimes led to decisions unduly extending the confines of name-monopolies. For a time the courts were remarkably generous in fixing the boundaries of such monopolies. *Today the tendency is to be somewhat less generous. (Durable Toy & Novelty Corp.* v. *J. Chein & Co.* 133 F2d 853, 1943) *We approach the case at bar, then, having in mind the basic common law policy of encouraging competition and the fact that the protection of monopolies in names is but a secondary and limiting policy.*" (Emphasis added.)

Eastern Wine Corp. v. *Winslow-Warren Ltd., Inc.*, 137 F2d 955, 959 (1943).

In 1943 a District Court in Nebraska had this to say on the matter of the obligation of a new competitor toward the non-discriminating public:

[fol. 214] "Upon this branch of the case the law is settled that competition is not forbidden but rather unfairness in competition and that the essence of actionable unfairness in competition is the creation by one come newly into a competitive field of a situation that is reasonably calculated to result in the passing off of his goods as those of his competing predecessor in the market. Again, *the new competitor is not held to the obligation of an insurer against some confusion*, but is required only to use reasonable care to inform the public of the source of his product, to use every reasonable means to prevent confusion. *Pointedly, he is not obliged so to guard his competitive methods that even the negligent or inattentive purchaser will be protected from confusion. As the cases in some instances have put it, he is not required to make the market 'fool proof'.*" *Skinner Mfg. Co.* v. *General Foods Sales Co.*, 52 Fed. Supp. 432, 450 (194) (Emphasis added)

The thorough-going analysis of the law made by the District Court in this case was commented upon with ap-

proval by the Circuit Court on appeal[3] and certiorari was denied by the Supreme Court of the United States. Even more recently, in 1950, the Court of Appeals for the 7th Circuit made this pertinent observation:

> "A new competitor is not held to the obligations of an insurer against all possible confusion. *He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference* . . . In *Fruit Growers Co-op.*, 170 F2d 834 at page 837, this court said: '. . . Instead they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken . . .'." *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F2d 4, 8 (1950). (Emphasis added.)

[fol. 215] In light of the foregoing authorities and many others cited in Respondent's briefs and exceptions (and not mentioned either by the examiner or the majority), I conclude that the public confusion or the likelihood of its continuance established in this record is not such that this Board should enjoin Respondent from continued use of its corporate name on the grounds of unfair competition.

Aside from the foregoing difficulties which I have relative to the findings of public confusion in this case, I must also differ with the finding as to secondary meaning made by both the examiner and the majority. This legal doctrine has been clearly defined in several cases, but in no case do I find that it has been applied to protect the user of a geographical name such as "American", where that user was neither the first nor the exclusive user. As shown by this record, of course, American Airlines can claim to be neither the first nor the exclusive user.

I have carefully examined the thirteen cases upon which the examiner and the majority rely for the finding that the term "American" when applied to air transportation has taken on a secondary meaning so that a new airline must not be allowed to use the term as any part of its business

---

[3] *Skinner Manufacturing Co.* v. *Kellogg Sales Co.*, 143 F2d 895 (1944) Cert. Denied, 323 U. S. 766.

name. If every one of the cases cited the plaintiff prevails under this theory of secondary meaning because *without exception the plaintiff was both the first and sole user of the name involved.*[4] Furthermore, in eleven of the thir- [fol. 216] teen cases the name sought to be used by the new competitor was either identical to that of the first and exclusive user or sounded identical thereto or differed therefrom only by the omission of one letter (viz., "Finchley" as the original name compared with "Finchly" used by the new competitor in the *Finchley Case*). Also in many of the cases cited by the examiner, the courts made specific findings that the second user of the name involved had adopted it with the willful and fraudulent intent to deceive the public (*Standard Paint Case, Barton Case, Delaware and Lackawanna Case,* and *Finchley Case*)—whereas in the case now before us the examiner made no such finding but, in fact, found that "There is no evidence of record that North American adopted its name with intent to deceive the public or trade upon the good will and business reputation of American."[5]

In other cases cited by the examiner in support of his finding of secondary meaning the courts found, as a matter

---

[4] *Hudson Tire Co., Inc.* v. *Hudson Tire & Rubber Corporation et al.*, 276 Fed. 59 (1921).

Standard Paint Co. v. *Rubberoid Roofing Co., et al.*, 224 Fed. 695 (1915).

American Products Co. v. *American Products Co.*, 42 F2d 488 (1930).

American Radio Stores, Inc. v. *American Radio and Television Stores Corp.*, 150 A. 180 (1930).

Delaware L. & W. R. Co. v. *Lackawanna Motor Freight Lines*, 175 Atl. 905 (1934).

Barton et al. v. *Rex-oil Co., Inc.*, 2 F2d 402 (1924).

American Thread Co. v. *North American Thread Co., Inc.*, 33 Fed. Supp. 616 (1935).

Womble v. *Parker*, 67 S.E. 2d 133 (1951).

Phillips v. *The Governor & Co. of Adventurers of England trading into Hudson Bay*, 79 F2d 971 (1935).

Lincoln Motor Co., et al. v. *Lincoln Automobile Co.*, 44 F2d 812 (1930).

Finchley, Inc. v. *Finchly Co., Inc.*, 40 F2d 736 (1929).

Western Auto Supply Co. v. *Knox*, 93 F2d 850 (1937).

Thomas A. Edison, Inc. v. *Shetkin*, 69 Fed. Supp. 176 (1946).

[5] Examiner's Report, page 15.

of fact, truly substantial evidence not only of public deception, but also of actual injury to the trade or profits of the plaintiff. (*Barton Case, American Radio Stores Case* and the *Womble Case.*) On this point also the examiner in the case now before the Board has specifically found *no evidence* that American has been injured by North American's operation.

In light of the foregoing distinguishing features of the cases cited from the facts in the present record, I cannot agree that American Airlines has established a secondary [fol. 217] meaning in the term "American" when applied to air transportation such as to give that carrier an "exclusive" property right to the name or such as to require North American Airlines to be enjoined from further use of that term in its name.

In light of what I have said earlier concerning my differences with the majority on the extent of public confusion actually proven here, I must also dissent from their finding that the similarity of the two names, American Airlines, Inc., and North American Airlines, Inc., is so great as to require us in the public interest to enjoin North American from further use of its corporate name. Although it is not clear from the majority opinion itself whether the finding as to similarity in names is based on evidence of public confusion; or merely upon the comparison of the two names in the minds of the majority without reference to public confusion, I must dissent from their finding on whichever basis the finding of similarity is made.

Finally, even if I did not have the foregoing difficulty with the majority's findings of public confusion and secondary meaning, I would nevertheless have to take this occasion to question seriously the wisdom of the sanction imposed by the majority in this case which, in effect, absolutely prohibits North American Airlines from using the name "American" in any way in its business name. The effect of this prohibition, of course, is to nullify the efforts which that carrier has made and the substantial sums of money which it has expended in building up public good will under that name. I have difficulty in minimizing these serious consequences by simply finding, as the majority does, that North American must be prepared to accept the

reasonable consequences of its adoption of its name. Rather than insist on the absolute prohibition against continued use of its name, it would seem reasonable to me that American would be amply protected if North American were required to make more clear in its advertisements and contact with the public that it is not to be confused with American Airlines. This could be done, it seems to me, in any one of several ways, but regardless of the method used, North American would be enabled to capitalize upon [fol. 218] the good will which it has engendered since 1951 under its corporate name.[6]

/s/ Joseph P. Adams

APPENDIX

EXCERPTS FROM THE INITIAL DECISION OF WALTER W. BRYAN, EXAMINER IN THE NORTH AMERICAN AIRLINES, INC., CASE DOCKET NOS. 5774 AND 5928

This proceeding arises as the result of the Board's order serial No. E-7107, dated January 28, 1953, in which it is ordered that an investigation be instituted to determine whether North American Airlines, Inc., formerly Twentieth Century Air Lines, Inc., in engaging in air transportation under the name of North American Airlines, Inc., North American Airlines, or North American, has been and is engaging in activities and practices in violation of section 411 of the Act, and if any such violation is established, whether the Board should issue an order directing North American to cease and desist from such violations.

It is indicated in the record that on March 11, 1952, Twentieth Century Air Lines, Inc. (Twentieth Century) advised the Board that the corporate name of Twentieth Century had been changed to North American Airlines, Inc., (North

---

[6] Support for this type of relief rather than that decided upon by the majority is found in several cases including *Singer Manufacturing Company* v. *Bent*, 163 U. S. 205, and *French Republic* v. *Saratoga Vichy Company*, 191 U. S. 427.

American) effective March 3, 1952, and it requested the Board to change its records accordingly and reissue its letter of registration in the new name.

On August 19, 1952, the Board adopted an amendment No. 7 to Part 291 of its Economic Regulations, effective September 23, 1952. The above amendment added a new section, 291.28, *Business Name of Air Carrier*, which provided:

> "On and after November 15, 1952, it shall be an express condition upon the operating authority granted [fol. 219] by this Part and the letters of registration issued hereunder that the air carrier concerned, in holding out to the public and in performing air transportation services shall do so only in a name the use of which is authorized under the provisions of this section.
>
> (a) Except as otherwise provided under paragraph (b) of this section, an air carrier may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith.
>
> (b) An air carrier may do business in such other and different name or names as the Board may by order permit, upon a finding that the use of such other name or names is not contrary to the public interest. Any such permission may be made conditional upon the abandonment of the use of the name in which its letter of registration is issued and outstanding, in air transportation service by the air carrier concerned, or otherwise be made subject to such reasonable terms and conditions as the Board may find necessary to protect the public interest."

On October 6, 1952, North American timely filed an application under the above regulation for authority to conduct its operations under the name North American Airlines, Inc., in lieu of Twentieth Century Air Lines, Inc. Upon consideration of this application the Board determined to institute the above described investigation

and by its order consolidated the above application, Docket No. 5774, with the investigation proceeding, Docket No. 5928, for hearing and decision.

American Airlines, Inc., (American) was permitted to intervene and participated in the proceeding. A hearing has been held and all parties given an opportunity to file briefs with the Examiner.

Issues.—The issue involved here is whether North American has been or is engaged in unfair or deceptive practices, or unfair methods of competition in air transportation, within the meaning of section 411 of the Act, by the use [fol. 220] of the name North American Airlines, Inc., North American Airlines, or North American, and if any violation is established whether North American should be ordered to cease and desist therefrom; also whether the granting of the request in North American's application for leave to change its name to North American Airlines, Inc., would be contrary to the public interest.

Twentieth Century Airlines, Inc., was incorporated in North Carolina on May 4, 1946, and holds a letter of registration as a large irregular air carrier. On March 3, 1952, the above carrier amended its articles of incorporation so as to change its name to North American Airlines, Inc. Since on or about April 21, 1951, the above carrier has engaged in the air transportation of persons between, among other points, New York, Chicago, and Los Angeles, under the trade name of North American Airlines.

American Airlines, Inc., (American) the intervener in this proceeding, was incorporated in Delaware on April 11, 1934, suc-eeding American Airways, Inc., which was incorporated under the laws of Delaware on January 25, 1930. American has continuously engaged in air transportation of persons, property, and mail since the above dates and has operated between, among other places, New York, Chicago, and Los Angeles as a scheduled air carrier.

American registered on July 27, 1948, the name "American Airlines" under the Federal Trademark Act, 15 U.S.C. 1051 et seq., on the Principal Register (No. 514294) of the United States Patent Office as a service mark used in connection with the furnishing of air transportation. Since

1934 American has concentrated in its advertising [on] the names "American" and "American Airlines" with the purpose of creating in the public mind an identity between the name American and its air transportation service. There were introduced in evidence samples of such advertising as ["American's Leading Airline"], ["Better by Air—Best by American"], "American to Detroit the Most Frequent Service," "American to Washington $98 via DC-6 Airtourist Service," "American to New York 11 Nonstop Flagships," and "American's Convairs Are Coming."

[fol. 221] The above type of advertising has appeared weekly on 251 billboards and in 142 newspapers throughout the country with a combined circulation of approximately 28,000,000. American has spent in excess of $2,250,000 for the above type of advertising since 1949.

American has also advertised extensively in magazines and during the period between 1948 and 1952 it spent approximately $3,800,000 for such advertising. It also advertises in the various cities served by American by means of display signs appearing at airports and in other public places. In 1940 American produced a sales movie entitled "The American Way," which has been shown to groups throughout the country, depicting its service and the comfort, speed and convenience of air travel. American is currently spending on newspaper and billboard advertising approximately $600,000 annually.

An officer of American in testifying stated that in his opinion the extensive advertising of American service as being the leading airline in American air commerce had been accepted by the traveling public. He further stated that much of American's advertising is devoted to identifying American with a certain route structure and with a certain type of superior equipment.

The direct evidence of record consists of testimony of witnesses who, for the most part, are employed by American as ticket and reservation agents located at Los Angeles, Burbank, Chicago, and New York. There were also affidavits and written statements from ticket and reservation agents received in evidence for the purpose of establishing whether the names "American" or "American Airlines" and "North American" or "North American Airlines" are confusing to the traveling public.

The above evidence generally involved numerous inquiries on the part of the public made to American employees concerning service, rates, routes, and schedules of North American under the mistaken impression that North American and American were one and the same airline.

An officer of American testified that he had received from employees under his supervision numerous inquiries indi- [fol. 222] cating confusion between American Airlines and North American Airlines, and that * * * his office had received a telephone call from a representative of a trade union, complaining that an American sign was being painted by non-union painters, and upon investigation it was found that the sign was that of North American. There were instances of air passengers holding North American tickets attempting to check in for North American flights at American ticket counters—in fact, at the Burbank office this was a daily occurrence—and many of the passengers were still confused after an explanation had been made that American and North American were two different airlines. There were instances where North American passengers attempted to claim their baggage at the American counter; also other instances where prospective passengers insisted they were entitled to a discount for transportation on American because they held a "Buyers League Scrip Book." Upon an investigation by the passengers making the inquiries, it was learned that it was North American instead of American which offered a discount.

There were other instances of persons meeting incoming North American passengers who made inquiries at the American ticket counter at Burbank to determine time of arrival. Other inquiries were made of American agents at Los Angeles concerning an $80 fare from Los Angeles to New York, which the persons had heard advertised on television, and upon investigation it was found that it was North American they were referring to and not American. One witness testified that she had heard people state that they were under the impression that North American and American were the same or affiliated companies. Another witness for American testified that one person insisted that American flew from New York to Miami because she had heard a radio program to that effect, whereas the program in question was that of North American. There were in-

stances where mail addressed to North American was delivered to American Airlines' office. Tradesmen have dunned American for bills owed by North American and hotels have requested American's advice as to billing for [fol. 223] hotel charges incurred by North American crews. A witness for American stated that at its Burbank office the president of North American, who is on duty at the North American ticket counter at Lockheed air terminal, informed her that many persons would stop at his counter and request tickets to Dallas, Oklahoma City, or Tulsa, points which North American did not serve, and he would realize that the passengers were confused and that they were under the impression it was American's ticket counter. The president further stated to the witness that if the passengers were destined to New York or Chicago he would do everything he could to "steal" them.

There were many other instances similar to those referred to above that need not be repeated here. In general, they indicate that certain confusion exists on the part of the public in distinguishing the services of the two airlines in question.

The witnesses who appeared and testified on behalf of North American were ticket agents from Burbank and Washington, D. C. Their testimony was to the effect that they had not experienced any great degree of confusion on the part of the public involving the similarity of names between American and North American. The agent at Burbank stated it was a common occurrence at his counter for persons to inquire about the services of other carriers such as United and particularly the services of North Star —in fact, the witness had noticed a certain amount of confusion existing on the part of the public between North American and North Star. Another witness for North American stated that his experience had been that the majority of customers made inquiries concerning destinations of the various carriers and were not particularly confused about the similarity of names of the carriers.

Discussion.—Section 411 of the Civil Aeronautics Act empowers the Board to determine whether any air carrier or ticket agent has been engaged or is engaging in unfair or deceptive practices, or unfair methods of competition

in air transportation or the sale thereof, and if such is found to exist the Board is empowered to order discontinuance of such practices.

[fol. 224] * * * one must look for guidance to the decisions of the courts in their application of unfair trade practices as set forth under section 5 of the Federal Trade Commission Act, * * * The Federal Trade Commission has been given the jurisdiction by statute over unfair competition in the common law sense of the term and also under the statutory language as defined "any unfair method of competition or unfair or deceptive *act* or practice in commerce." It is noted that the word "act" in the Federal Trade Commmission Act has been omitted in section 411 of the Civil Aeronautics Act.

The courts have said that the unfair trade practice law is for the protection of the public and not for the experts, but rather for "the vast multitude which includes the ignorant, the unthinking, and the credulous, who in making purchases do not stop to analyze but are governed by appearance and general impressions."[1]

The most common form of unfair competition is the imitation of a trade name, trade symbol, or device by a competitor. This may be a family name or the name of a corporation, labels, or deceptive packaging. * * *

In the case of *Hudson Tire Co., Inc.* v. *Hudson Tire and Rubber Corporation et al.*, 276 F. 59, the court stated that the word "Hudson" as applied to tires had obtained a secondary meaning, referring to plaintiff's merchandise, and the fact that defendant had secured its corporate name from the State of New York did not authorize it to use the name "Hudson" in connection with such merchandise.

The courts have likewise held that in looking for a secondary meaning in a trade-mark, it is controlled by the fact that such a meaning has been acquired in the minds of the public rather than by the time it has taken for that fact to be established.[4]

Another case in point is that of *American Products Co.* v. *American Products Co.*, 42 F. 2d 488. It is noted that one

---

[1] See *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 178 F. 73; *Stork Restaurant, Inc.* v. *Sahati et al.*, 166 F. 2d 348.

[4] *Barton et al.* v. *Rex-oil Co., Inc.*, 2 F. 2d 402.

[fol. 225] of the above companies was a Delaware corporation and the other one a Michigan corporation. The court said, in part:

> "Assuming, for the purposes of this opinion, that the name 'American Products Company' should be regarded as a geographical name indicating products made in America, rather than a somewhat fanciful name not intended to denote the place of manufacture of such products, it is well settled that when a person has adopted, as the name of a business, a term originally geographical, and, by his efforts and expenditures, has developed a reputation and good will for such business and its products, so that such name has come to mean, in the minds of the general public, that particular business and its products, such name thereby acquires a secondary meaning, as indicating such business, and its owner is entitled to protection, in its use, by a court of equity."

In the case of *American Radio Stores, Inc.* v. *American Radio and Television Stores Corp.*, 150 A 180, the court stated:

> "Those words (radio and stores) are purely descriptive and, when used by the complainant, have attached to them no meaning of a secondary nature. But when the word "American" is used in conjunction with them, a distinguishing mark is introduced and the complainant is entitled to be protected in its use of that distinctive feature of its name."

In the case of *Delaware L. & W. R. Co.* v. *Lackawanna Motor Freight Lines*, 175 Atl. 905, the court held that the rights of the plaintiff were based on a secondary meaning acquired by its use in the transportation business, and its use by defendant was a device to deceive the public, although the court held that fraudulent intent need not necessarily be shown to invoke the aid of the court.

Another case in point is *American Thread Co.* v. *North American Thread Co., Inc.*, 33 F. Supp. 616, where the court held that a newcomer operating under a similar [fol. 226] name to a company already in the business was an act of unfair competition.

Another pertinent case is that of *Womble* v. *Parker*, 67 S. E. 2d 133, which involved a newcomer into a business wherein it attempted to advertise its products under a trade name similar to one already in use by its long-established competitor. The court said, in part:[5]

> "While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trade-marks or trade names, such names and words when used so long and exclusively by a trader, manufacturer or producer that they are generally understood to designate his business or merchandise, may acquire a secondary signification or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade name or trade-mark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of another."

It is clear from the foregoing that a geographical term used in a business name may acquire a secondary meaning by actual use and upon which the owner may create goodwill in its business relationship with the public. Thus such a name becomes a valuable asset and a business advantage. Therefore, in such instances the trade name becomes of a pecuniary value or a property right, and the courts have [fol. 227] consistently held that such rights are entitled to the protection afforded by the courts.

There can be no dispute that American Airlines is the prior user of the name "American" as between it and

---

[5] Other cases in point are: *Phillips* v. *The Governor & Co. of Adventures of England trading into Hudson Bay*, 79 F. 2d 971; *Lincoln Motor Co. et al.* v. *Lincoln Automobile Co.*, 44 F. 2d 812; *Finchley, Inc.* v. *Finchley Co., Inc.*, 40 F. 2d 736; *Western Auto Supply Co.* v. *Knox*, 93 F. 2d 850.

North American, as American has used the above name since 1934 and its predecessor used the name prior to that time, whereas North American has used its name only since April 1951. American has consistently over the years promoted the use of the term "American" in its advertising and public relation work. * * *

Upon consideration of all the facts, and in view of the court decisions pertaining thereto, it is concluded that the name "American" and "American Airlines" used in connection with air transportation has acquired a secondary meaning as identifying American Airlines, Inc.

* * * * * * *

One of the important factors in a case of this kind arising under section 411 is whether the public is being deceived or confused and thus affecting the public interest in air transportation. The court stated in the case of *Anheuser-Bush, Inc.* v. *Budweiser Malt Products Corporation*, 287 F. 243, that the fundamental question in cases of trade-marks or unfair competition is whether the public is being misled and deceived so that the defendant is in effect taking advantage of the good-will and business reputation of another who has built it up through service or advertising.[8]

There are numerous examples in the record indicating confusion between American and North American Airlines on the part of the public. * * *

The type of inquiries indicating confusion involved in this proceeding, which have heretofore been discussed, is typical of those occurring to the average member of the public. Naturally, such inquiries were not made by persons who are frequent travelers by air or well informed on aviation matters but rather the uni-formed, and it is the in-[fol. 228] terest of the uni-formed that the Board is required to protect from confusion because of similarity of names.

* * * The courts have consistently held that in cases involving violation of trade-marks the right of injunction depends not on the fact that the purchaser has been deceived but rather on the fact that the public may be deceived if such acts of confusion are permitted to continue. The proof

[8] See *United Drug Company* v. *Theodore Rectanus*, 248 U. S. 90.

that confusion has already existed adds to the likelihood of continued deception.[10]

There is no question but what American has acquired during the past 20 years through its constant efforts a good-will in its use of the name "American" or "American Airlines," which has become a valuable asset to be protected. However, an action for infringement of America's trade name can find its remedy in the courts. Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of a regulating competition between the various air carriers to assure fair competition and thereby maintain a sound economic transportation system; also, equally important, the Board was given the responsibility of safeguarding the public interest against unfair and deceptive methods of competition.

North American is a newcomer in the field of air transportation as compared to American's operations, and it should have known that the similarity of names between North American and American would have the capacity to confuse the public as to the true identity of the carriers. There are numerous instances of record where the public [fol. 229] has been confused and inconvenienced by this similarity of names. • • •

The task would not have been a difficult one for North American to have adopted another trade name which was different from the names of other air carriers in operation and thereby avoid the tendency on the part of the public to mistake one carrier for the other.

In view of the public confusion which has arisen and may increase in the future as air transportation becomes a more accepted mode of travel, and the services rendered by the carriers become more alike as well as the aircraft itself, it

---

[10] *J. C. Penney Co.* v. *H. D. Lee Mercantile Co.*, 120 F. 2d 949; *Ralston Purina Co.* v. *Saniwax Paper Co. et al.*, 26 F. 2d 941; *Wisconsin Electric Co.* v. *Dumore Co.*, 35 F. 2d 555; *Henry Muhs Co.* v. *Farm Craft Foods, Inc., et al.*, 37 F. Supp. 1913; *United Drug Co.* v. *Obear-Nester Glass Co.*, 111 F. 2d 997; *Pep Boys—Manny, Moe & Jack, Inc.* v. *Federal Trade Commission*, 122 F. 2d 158. *American Home Benefit Assn., Inc.* v. *United American Benefit Assn., Inc.*, 125 P. 2d 1010; *United Lace & Braid Mfg. Co.* v. *Barthels Mfg. Co.*, 221 F. 456.

is in the public interest that the identity of the carrier be readily distinguishable by the public. Therefore, the continued use of the name "North American" by Twentieth Century is so similar to the trade name "American" as used by American Airlines, Inc., as to constitute an unfair and deceptive practice as well as an unfair method of competition, and it is so found.

* * * * * * *

Order No. E-7870

BEFORE THE CIVIL AERONAUTICS BOARD

Docket No. 5774

In the Matter of the Application of NORTH AMERICAN AIRLINES, INC., for Authority to Conduct its Operations under the Name of North American Airlines, Inc.

Docket No. 5928

In the Matter of an Investigation Pursuant to Section 411 of the Act of Certain Practices of NORTH AMERICAN AIRLINES, INC.

ORDER—Adopted November 4, 1953

A full public hearing having been held in the above-entitled proceedings and the Board, upon consideration of [fol. 230] the record, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof;

It is ordered:

1. That the application of North American Airlines, Inc., for authority to engage in air transportation under the name North American Airlines, Inc., be and it hereby is denied;

2. That on and after the 90th day after the date of adoption of this order, North American Airlines, Inc., and its successors, assignees, representatives, agents, officers and employees be and hereby are ordered to cease and desist

from engaging in air transportation under the names North American Airlines, Inc., North American Airlines, North American, or any other name which includes the word American.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan, Secretary.

* * * * * * *

[fol. 295] BEFORE THE CIVIL AERONAUTICS BOARD

Economic Regulations, Amendment No. 7 to Part 291, Effective: September 23, 1952

REGULATIONS, Serial Number ER-178—
Adopted August 19, 1952

Business Name of Air Carrier

At the present time the Economic Regulations of the Board do not attempt to regulate the names under which air carriers do business. While a change in name by the holder of a certificate of public convenience and necessity has always been regarded by the Board as requiring an amendment to such certificate, there is no express requirement that the carrier do business under the exact name in which its economic operating authority is issued. The Board possesses the power, pursuant to section 411 of the Civil Aeronautics Act to require a carrier, after notice and hearing, to cease and desist from the use of a given name in cases where it finds that such use by the carrier concerned amounts to an unfair or deceptive practice or an unfair method of competition.

Until the relatively recent past there has been no need to make specific provision relating to the use of business names by air carriers since most carriers were in fact doing business under their official name without any compulsion to do so. However, there has been an increasing tendency, particularly among some of the large irregular carriers, to use names different from those in which operating authority is granted by the Board, in some cases the name being used having no identifiable relation to the name in which the authority is held. This has resulted in confusion in the

minds of the public, an increase in the administrative burden of the Board, and greater difficulty in achieving adequate enforcement of the Act and the regulations. The [fol. 296] Board has received an increasingly large number of complaints from the public indicating that the complainant did not know the true identity of the carrier against which the complaint was being made. In several instances, it has been necessary to undertake considerable correspondence and even field investigations in order to identify the carrier responsible. Aircraft accidents have been reported in the press as having involved air carriers bearing names not registered with or even known to the Board. In at least one instance, a trade name of a carrier whose operating authority had been revoked for willful violation of the Act was assumed by another carrier operated by the same management personnel as that of the carrier whose authority had been revoked.

Most important the foregoing practices, combined with equally unstable identities among ticket agencies, have made it difficult, and in many instances impossible, for members of the traveling public to know the identity with whom they are doing business. This has had serious consequences both with respect to the business relationships involved and with respect to liability for injury or death of a passenger or other members of the public, or the loss of or damage to property.

The possibility of such abuse exists for every type of air carrier, irrespective of how its operations are authorized; and, even though the number of abuses has been relatively small, the Board believes that it should not take action to enable it to deal effectively with such abuses and to prevent their occurrence. For this reason it is adopting this regulation together with companion amendments to Parts 202, 203, 292, 296, 297 and 298 of the Economic Regulations. In so doing it is the intention of the Board to permit the greatest managerial discretion possible in the use of business names consistent with the objective of the regulation. Accordingly, the regulation permits use of abbreviations, initials, nicknames and other variations of the name on file with the Board without obtaining permission therefor and places no restrictions on the use of slogans.

Moreover, in cases where the circumstances warrant such action, the Board may permit the use of two or more differ- [fol. 297] ent names by one carrier upon a showing that such multiple use will not be contrary to the public interest. Permission granted under this Part will not effect a formal change in name, but will merely constitute authority to use a different name.

It should also be noted that the restriction on the use of names does not become effective until 60 days after the effective date of the regulation. This 60-day period is designed to enable carriers which have developed goodwill in a name different from that in which their operating authority is held, to apply for and obtain permission to use such other name either exclusively or in conjunction with its certificated name. In cases where goodwill has been established in a name by use thereof, the Board will deny permission to continue such name only in cases where it believes that a violation of section 411 may be involved and such fact has been established after notice and opportunity for a hearing.

Interested persons have been afforded an opportunity to participate in the making of this rule and due consideration has been given to all relevant matter presented.

In consideration of the foregoing, the Civil Aeronautics Board hereby amends Part 291 of the Economic Regulations (14 CFR 291) effective September 23, 1952, by adding thereto a new section 291.28 to read as follows:

291.28 *Business Name of Air Carrier.* On and after November 15, 1952 it shall be an express condition upon the operating authority granted by this Part and the letters of registration issued hereunder that the air carrier concerned, in holding out to the public and in performing air transportation services shall do so only in a name the use of which is authorized under the provisions of this section.

(a) Except as otherwise provided under paragraph (b) of this section, an air carrier may do business in the name in which its letter of registration is then issued and outstanding, including abbreviations, contractions, initial letters, or other minor variations of such name which are readily identifiable therewith.

(b) An air carrier may do business in such other and dif-
[fol. 298] ferent name or names as the Board may by order permit, upon a finding that the use of such other name or names is not contrary to the public interest. Any such permission may be made conditional upon the abandonment of the use of the name in which its letter of registration is issued and outstanding, in air transportation service by the air carrier concerned, or otherwise be made subject to such reasonable terms and conditions as the Board may find necessary to protect the public interest.

(c) Slogans shall not be considered names for the purposes of this section, and their use is not restricted hereby.

(d) Neither the provisions of this section nor the grant of a permission hereunder shall be deemed to constitute a finding for purposes other than for this section, or to effect a waiver of, or exemption from, any provisions of the Civil Aeronautics Act, or any orders, rules, or regulations issued thereunder.

(Section 205(a), 52 Stat. 984, 49 U. S. C. 425. Interpret or apply sections 411, 416(a), 416(b); 66 Stat. 628, 52 Stat. 1004; 49 U. S. C. 491, 496.)

By the Civil Aeronautics Board:

/s/ M. C. Mulligan, Secretary

Part 291 last printed June 1, 1950.

[fol. 481] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File endorsement omitted]

No. 12041

NORTH AMERICAN AIRLINES, INC., Petitioner

v.

CIVIL AERONAUTICS BOARD, Respondent

AMERICAN AIRLINES, INC., Intervenor.

On Remand from the Supreme Court of the United States

Before: PRETTYMAN, FAHY and DANAHER, Circuit Judges.

OPINION—Decided July 12, 1956

PER CURIAM:

This case is before us now on remand from the Supreme Court, *American Airlines* v. *North American Airlines*, 351 U.S. 79. In the light of the decision of the Supreme Court we hold that upon consideration of the record as a whole the finding of the Board that the use by petitioner of the name "North American Airlines, Inc.," "North American Airlines," or "North American," causes substantial public confusion which is likely to continue, is supported by the evidence. We accordingly affirm the order of the Board insofar as it denies the application of petitioner for authority to engage in air transportation under the name North Amer-[fol. 482] ican Airlines, Inc., and orders it to cease and desist from engaging in air transportation under the names North American Airlines, Inc., North American Airlines, or North American. But the evidence does not support the finding of the Board that the term "American" had acquired a secondary meaning before petitioner incorporated that term in its name or changed its corporate name, or the finding that such secondary meaning continues to exist. Accordingly, we set aside the order of

the Board insofar as it orders petitioner to cease and desist engaging in air transportation under any other name which includes the word "American."

In view of the foregoing and because of the representations made to us by motion of intervenor, American Airlines, Inc., that during the pendency of the remand petitioner has abandoned the use of the name North American Airlines, Inc., and is now using the name "Trans American Airlines," the case will be remanded to the Board for such further proceedings as it may be advised, and as are consistent with this opinion.

It is so ordered.

[fol. 483] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,041

NORTH AMERICAN AIRLINES, INC., Petitioner,

v.

CIVIL AERONAUTICS BOARD, Respondent,

AMERICAN AIRLINES, INC., Intervenor.

Before: PRETTYMAN, FAHY and DANAHER, Circuit Judges.

ORDER PURSUANT TO REMAND BY THE SUPREME COURT—July 12, 1956

This case came on for consideration on the record from the Civil Aeronautics Board pursuant to the judgment and opinion of the Supreme Court of the United States in this case.

On Consideration Whereof, it is ordered by the Court that the judgment and decree of this Court entered herein June 23, 1955, be, and it is hereby, vacated and set aside, and that the certified copy thereof which issued to the Civil Aeronautics Board on July 12, 1955, be, and it is hereby, recalled; and

It is further Ordered and Adjudged by the Court that the order of the Civil Aeronautics Board on review in this case in so far as it denies the application of petitioner for authority to engage in air transportation under the name North American Airlines, Inc., and orders it to cease and desist from engaging in air transportation under the names North American Airlines, Inc North American Airlines, or North American be, and the same is hereby, affirmed; and that said order of the Civil Aeronautics Board in so far as it orders petitioner to cease and desist engaging in air transportation under any other name which includes the word "American" be, and the same is hereby, set aside, and that this case be, and the same is hereby, remanded to the Civil Aeronautics Board for such further proceedings as it may be advised, and as are consistent with the opinion of this Court, this day filed herein.

PER CURIAM.

[fol. 532] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

[File endorsement omitted]

Before: PRETTYMAN, FAHY and DANAHER, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—
September 18, 1956

Upon consideration of the petition for rehearing and modification of the opinion filed by respondent; it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

PER CURIAM.

[fol. 535] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 536] IN SUPREME COURT OF THE UNITED STATES

No. 635, October Term, 1956

AMERICAN AIRLINES, INC., Petitioner,

v.

NORTH AMERICAN AIRLINES, INC., and CIVIL AERONAUTICS BOARD

ORDER ALLOWING CERTIORARI—January 28, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.